(1)

No. 91-548

In The

Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?

II. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

LIST OF PARTIES

The petitioners in this Court were the respondents in the proceedings below: Ellis B. Wright, Warden, and Mary Sue Terry, Attorney General of Virginia (hereafter "the Commonwealth"). The respondent, Frank Robert West, Jr., a Virginia prisoner, was the petitioner in the proceedings below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 931 F.2d 262 (4th Cir. 1991). (App. 1-22). The Fourth Circuit's amended order denying the Commonwealth's petition for rehearing and suggestion for rehearing in banc is reprinted in the appendix. (App. 34-35).

The memorandum opinion of the United States District Court for the Eastern District of Virginia, which denied West's petition for habeas corpus relief, is unreported but is reprinted in the appendix. (App. 23-33).

JURISDICTION

The judgment of the Fourth Circuit was entered on April 29, 1991. The amended order denying the Commonwealth's petition for rehearing was entered on July 8, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . . "

STATUTORY PROVISIONS

At the time of West's trial in 1979, Virginia Code § 18.2-95 provided in pertinent part that "[a]ny person who . . . [c]ommits simple larceny not from the person of another of goods and chattels of the value of $100 or more, shall be deemed guilty of grand larceny which shall be punishable by confinement . . . for not less than one nor more than twenty years or in the discretion of the jury . . . [confinement] in jail for a period not exceeding twelve months or [a fine of] not more than $1,000, either or both." (Va. Code Ann. § 18.2-95 (Repl. Vol. 1975)).[1]

[1] The statutory minimum value has since been raised to $200. *See* Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).

The United States Code, 28 U.S.C. § 2254(a), provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

On December 13, 1978, Angelo Cardova left his vacation home in Westmoreland County, Virginia, to return to his residence in Northern Virginia. Cardova secured the house when he left and gave no one authority to enter the home, or remove any property from it. Cardova returned to the vacation house on December 26, 1978, and discovered that it had been burglarized and that various items valued at over $3,000 had been stolen. (App. 2).

On January 10, 1979, sheriff's deputies from Westmoreland and Northumberland Counties searched the Gloucester County home of Frank Robert West, Jr. The deputies found numerous items that had been stolen from the Cardova residence. It is undisputed that West had exclusive possession of the stolen items. (App. 2-3).

West was indicted for grand larceny in Westmoreland County. At trial, Mr. Cardova identified a wide variety of items found in West's possession as having been taken from his vacation home: two television sets, a sleeping bag, a shell-framed mirror, a coffee table, a ball-shaped hardwood carving, a synthetic-fiber fur coat with the name "Esther" embroidered in the lining, a box of flatware, a mounted lobster, a silk jacket with "Korea 1970"

embroidered on the outside, and a record player. The value of the items recovered from West's residence was about $1,100. (App. 3).

When West, a previously convicted felon, testified at trial, he denied stealing the items found in his home and claimed to have purchased some of them from a Ronnie Elkins. (CA4 App. 168a-179a).[2] Elkins did not testify, however, and the defense presented no evidence to substantiate West's "explanation."

Even the court below conceded that West's trial testimony "was somewhat confused and [that] he was unable to account for how he acquired some of the merchandise." (App. 4). In fact, the court conceded that "at first blush [West's testimony] may itself seem incredible, thereby drawing all else in question." (App. 19, n.7). The very best that the Fourth Circuit could say about West's "explanation" was that "there was nothing inherently implausible about" it. (App. 18).

The jury was properly instructed, without objection, on the Commonwealth's burden of proof beyond a reasonable doubt, West's presumption of innocence, the jury's role in assessing the credibility of witnesses, and the proper use of circumstantial evidence. The jury was also properly instructed on the elements of the offense. (CA4 App. 209a-221a).

Concerning Virginia's longstanding common law inference involving exclusive possession of recently stolen property, the jury was instructed:

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[2] "CA4 App." refers to the parties' joint appendix in the Fourth Circuit.

> If you believe from the evidence beyond a reasonable doubt that property of a value of $100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

(App. 4). West did not object to this instruction at trial and has never claimed that the instruction was erroneous. The jury found the petitioner guilty of grand larceny and sentenced him to ten years imprisonment.

West's direct appeal raised several issues, including whether the evidence was sufficient to support his conviction. The thrust of his sufficiency claim was that West had provided a reasonable explanation for his possession of the stolen property. (CA4 App. 60a-62a). No claim attacking the validity of Virginia's common law inference was raised. On May 30, 1980, the Supreme Court of Virginia, finding no reversible error, refused the petition. (CA4 App. 40a).

On May 10, 1987, almost eight years after his conviction, West filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. (CA4 App. 71a-78a). That petition repeated the claim that the evidence was insufficient to support his conviction, but again, there was no attack upon the validity of the common law inference.

(CA4 App. 73a). The petition was denied and dismissed on May 13, 1988. (CA4 App. 80a).

On June 12, 1988, West filed his federal habeas petition in the United States District Court for the Eastern District of Virginia, Richmond Division. Included in his petition was his claim that the evidence was insufficient to support his conviction; once again, however, West did not attack the validity of Virginia's common law inference. (CA4 App. 16a, 19a-20a). United States District Judge James R. Spencer applied the constitutional standard established by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and found that "there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt." Judge Spencer specifically noted West's attempt to explain his possession of the stolen goods, but concluded that "[i]t is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation." (App. 28).

On April 29, 1991, a panel of the Fourth Circuit reversed the district court, concluding that West's grand larceny conviction violated "due process." (App. 20). The panel did so only after expressing its "concern about the continued viability of the inference's basic premise," and its belief that the "premise [for the inference] has been substantially undercut by intervening technological and demographic developments," whatever that means. (App. 11-13). The court conceded, however, that the jury had been properly instructed with respect to the inference. (App. 20).

On May 10, 1991, the Commonwealth petitioned for rehearing with a suggestion for rehearing in banc. The

ten judges of the Fourth Circuit split 5 to 5 on whether to grant a rehearing in banc, and the Commonwealth's petition was thus denied. (App. 34-35). The court nevertheless stayed the issuance of its mandate so the Commonwealth could seek certiorari review in this Court. (App. 36).

REASONS WHY THE WRIT SHOULD BE GRANTED

THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE DECISION BELOW.

This Court has emphasized that the interests of finality, comity and federalism are at the heart of federal review of state convictions under 28 U.S.C. § 2254. These important interests, however, cannot long survive if a federal appeals court is permitted to overturn a twelve-year-old conviction simply because it disagrees with a firmly-engrained principle of a state's common law.

For centuries, judges and juries have been permitted, as the jury was in West's case without objection, to infer that the possessor of recently stolen goods is the thief. Thus, where it was undisputed that West was found in exclusive possession of recently stolen goods, and where the jury clearly rejected West's attempt to explain such possession, the state court decisions affirming his grand larceny conviction against a sufficiency-of-the-evidence challenge were unquestionably reasonable. The Fourth Circuit's second-guessing of those decisions on the basis of its "concern" about the modern-day validity of the common law inference – a matter never raised by West in

state court or in the district court – simply cannot be squared with this Court's cases circumscribing the scope of federal collateral review.

A

CERTIORARI SHOULD BE GRANTED TO MAKE CLEAR ONCE AND FOR ALL THAT A FEDERAL COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR A REASONABLE GOOD FAITH JUDGMENT REACHED BY THE STATE COURTS.

This Court announced the "new rule" doctrine in *Teague v. Lane*, 489 U.S. 288 (1989). Since then, the lower federal courts have had little difficulty applying the doctrine in cases where the petitioner is asking for retroactive application of a case decided since his conviction became final. *See, e.g., Bassette v. Thompson*, 915 F.2d 932, 938 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1639 (1991).

But a ban on retroactive application of newly-decided cases is not the only precept of the "new rule" doctrine. When state courts make "reasonable, good-faith interpretations of existing precedents," a subsequent ruling to the contrary by a federal habeas court is, by definition, "new" and is thus prohibited. *See Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990), *citing United States v. Leon*, 468 U.S. 897 (1984) ("good faith" exception to exclusionary rule). It is *this* aspect of the "new rule" doctrine that the lower federal courts time and again have failed or refused to recognize; indeed the Fourth Circuit's decision in this case is a prime example of such misunderstanding of the doctrine's basic thrust. *See also Stamper v. Muncie*, ___ F.2d ___, ___ n.5, 1991 WL 156476 (4th Cir. 1991)

("Finding no error we leave to another day consideration of the Commonwealth's assertion" of the "new rule" doctrine); *Sanders v. Sullivan*, 900 F.2d 601, 605-606 (2d Cir. 1990) ("new rule" doctrine does not apply to state court's rejection of perjured-testimony claim); *Moore v. Zant*, 885 F.2d 1497, 1502-1503 (11th Cir. 1989) (ignoring "new rule" doctrine even though case had been remanded by this Court "for further consideration in light of *Teague v. Lane*"), *cert. denied*, 110 S.Ct. 3255 (1990).

"[T]he purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing examination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). A federal habeas court, therefore, must "validate reasonable, good-faith interpretations of existing precedents made by state courts." *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990).

Determining whether a state court's rejection of a petitioner's claim was "reasonable" and in "good faith" requires a determination whether constitutional precedent existing at the time the petitioner's conviction became final "compelled" a decision in his favor. *Saffle*, 110 S.Ct. at 1261. Acceptance of a petitioner's claim cannot be considered to have been "compelled," however, if it was "susceptible to debate among reasonable minds." *Butler*, 110 S.Ct. at 1217. And this Court has expressly cited as evidence that a claim is "susceptible to debate" the fact that the claim has been rejected by other courts. *Id.*

It would be difficult to imagine a more clear-cut violation of this component of the "new rule" doctrine than the decision of the court below.[3] West's sufficiency claim was rejected by the state trial judge, all seven members of the Virginia Supreme Court, and a federal district court judge. Surely this concurrence of judicial opinion demonstrates, at the very least, that West's claim was not "dictated" or "compelled" in 1979 or now by *Jackson v. Virginia*.

The case upon which the Fourth Circuit relied, moreover, was not decided until more than two years after West's conviction became final. *See Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). This violation of the "new rule" doctrine is only highlighted by the fact that the *Jackson* "rational factfinder" test is *less* demanding of the prosecution than the "every reasonable hypothesis of innocence" standard that the Virginia Supreme Court applied to West's sufficiency claim on direct appeal. *See Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir.), *cert. denied*, 474 U.S. 833 (1985).

The intrusive "second-guessing" indulged in by the Fourth Circuit is precisely the type of federal intervention the "new rule" doctrine was meant to proscribe. The

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[3] This Court has made clear that there are only two exceptions to the "new rule" doctrine. *See Sawyer*, 110 S.Ct. at 2831. The Fourth Circuit conceded that neither of these exceptions was applicable to West's claim (App. 9, n.3), but nevertheless held that the doctrine does not apply to sufficiency-of-the-evidence claims. (App. 10).

Court of Appeals conceded that its decision was "a judgment call" (App. 13-14) and that it represented a "disagreement on [a] fundamental matter with a properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge. . . . from a vantage point far removed from the immediacy of the testimonial evidence whose sufficiency is at issue." (App. 20). But after stating the very reason why federal courts must refrain from second-guessing state courts, the Fourth Circuit did *exactly* what it may not do: it substituted its own "judgment call" for the reasonable good faith judgment of the state courts.

The Court of Appeals' decision, moreover, is doubly intrusive because it is replete with references to a "growing discomfort . . . about allowing convictions in this day and age to be based solely upon [the common law] inference" and the court's belief that "the basic premise of the inference . . . has been substantially undercut by intervening technological and demographic developments." (App. 11-13). But the continued vitality of the common law inference was *never* challenged by West in state court. Nor for that matter was it ever mentioned by West in the district court.

The sufficiency claim West litigated on direct appeal in the Virginia Supreme Court expressly acknowledged the validity of the inference under Virginia law: "The law in Virginia is clear that the recent and exclusive possession of stolen property *will warrant a conviction of larceny* unless the defendant affords a reasonable account of his possession." (CA4 App. 60a, emphasis added). West's claim in the Supreme Court of Virginia was *not* that the common law inference had lost any of its vitality, but

simply that "the inference of guilt which the Commonwealth may have established was rebutted" by his explanation at trial. (CA4 App. 61a). The Virginia Supreme Court rejected that claim, and West's conviction became final in 1980 when he failed to petition this Court for a writ of certiorari.

Seven years later, West initiated state habeas proceedings by filing a petition in the Virginia Supreme Court which raised the very same sufficiency claim he had raised on direct appeal. The petition said nothing about the continued validity of the common law inference. (CA4 App. 73a). The Supreme Court dismissed the sufficiency claim because it had already been rejected on direct appeal. (CA4 App. 80a, citing *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970)).

West, moreover, never even hinted, much less advanced, any allegation about the inference's modern-day applicability when he filed his petition in the district court. (CA4 App. 16a, 19a-20a). And when he later filed another pleading in the district court, he once again expressly conceded the validity of the inference under Virginia law. (CA4 App. 106a).

The district court's opinion shows no sign that West raised any concern about the strength of the common law inference in modern times. To the contrary, the district judge approached the allegation of insufficient evidence as a straightforward *Jackson* claim, applied the proper standard of review, and deferred to the jury's assessment of West's credibility as mandated by *Jackson*: "It is clear from the evidence . . . that the jury did not believe [West's] explanation." (App. 28).

On direct appeal, West did not attempt to seek certiorari review in this Court. If he had done so, this Court would have been without jurisdiction to review a claim challenging the modern-day validity of the common law inference because no such claim had been raised in the Virginia Supreme Court. *See* 28 U.S.C. § 1257; Rule 14.1(h). By granting West habeas relief on the basis of such a defaulted claim, the Fourth Circuit has afforded him "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *See Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991). Such an "end run" is totally at odds with the "new rule" and procedural default doctrines and, if left uncorrected, will have a ruinous effect on the vital State interests those doctrines were established to foster and protect.

B

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS, IN A COLLATERAL PROCEEDING, HAS EVISCERATED A DEEPLY-ROOTED PRINCIPLE OF COMMON LAW.

When a federal appeals court reverses a federal district court and grants collateral relief to a state prisoner only by reworking and emasculating a longstanding common law principle, this Court should exercise its certiorari power to restore the balance that our system of federalism demands. This is such a case.

The Fourth Circuit readily conceded that "[t]he inference that one found in unexplained possession of recently stolen goods was a participant in the theft is an ancient

one." (App. 11). *See generally Barnes v. United States*, 412 U.S. 837, 843-844 n.5 (1973), *quoting* Thayer, *Preliminary Treatise on Evidence* 328 (1898) ("[T]he laws of Ine [King of Wessex, A.D. 688-725] provide that, 'if stolen property be attached with a chapman, and he have not brought it before good witnesses, let him prove . . . that he was neither privy (to the theft) nor thief' "). *See also* 2 East's, Pleas of the Crown 656 (1716) ("Whenever the property of one man . . . is found (recently after the taking) upon another, it is encumbent on that other to prove how he came by it; otherwise, the presumption is, that he has taken it feloniously."). And, as the Fourth Circuit also conceded, the inference "has been widely employed . . . in our state and federal courts from earliest times." (App. 11). *See, e.g., Commonwealth v. Millard*, 1 Mass. 6 (1804). *See also Wilson v. United States*, 162 U.S. 613, 619-620 (1896).[4]

Virginia, of course, is a State with a long and still vibrant common law tradition, *see* Va. Code § 1-10, and the "recent possession" principle is deeply rooted in our law. "At least since 1872 Virginia juries have been instructed that the defendant's exclusive possession of recently stolen goods, if he offers no reasonable explanation, permits a presumption or inference that the defendant stole the goods." R. Groot, *Criminal Offenses and Defenses in Virginia* 222 (2d ed. 1989), *citing Price v. Commonwealth*, 62 Va. (21 Gratt.) 846, 869 (1872). *See also Carter*

[4] Without attempting an exhaustive survey of the states, it is nevertheless clear that the common law inference presently retains widespread acceptance throughout the Nation. *See generally* Annot., 89 A.L.R.3d 1202 (1979).

v. Commonwealth, 209 Va. 317, 323-324, 163 S.E.2d 589, 594 (1968), *cert. denied*, 394 U.S. 991 (1969); *Bright v. Commonwealth*, 4 Va.App. 248, 251, 356 S.E.2d 443, 444 (1987).

In accordance with the common law, Virginia also recognizes that, if an accused thief such as West attempts to explain his possession of the stolen goods, it is solely the jury's province to determine the credibility of the explanation. *See Montgomery v. Commonwealth*, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980). The jury need not accept the defendant's explanation even if it is "not inherently incredible." *Id.* Moreover, *as this Court itself held nearly a hundred years ago*, if the jury concludes that the defendant has falsely "explained" his possession of the stolen goods, such falsehood can be construed by the jury as affirmative evidence of his guilt. *See Wilson*, 162 U.S. at 620-621 ("Nor can there be any question that, if the jury were satisfied . . . that false statements . . . were made by the defendant . . . they had the right . . . to regard [such statements] . . . as in themselves tending to show guilt.").

Let there be no mistake about exactly what the Fourth Circuit's ruling means: henceforth, a federal court is free to collaterally invalidate a state larceny conviction on sufficiency grounds, thereby barring even the possibility of retrial,[5] simply by disagreeing with the jury's assessment of whether the defendant's explanation for his possession of the stolen goods was credible. As this Court's cases make clear, however, the legitimate interests of finality, comity and federalism cannot be so easily brushed aside. Given the inference's hoary pedigree, the

[5] *See Burks v. United States*, 437 U.S. 1 (1978).

Court of Appeals' collateral evisceration of it in the name of "due process" is indefensible. *See Schad v. Arizona*, 111 S.Ct. 2491, 2507 (1991) (Scalia, J., concurring) ("Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.' ").

C

CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' UNAUTHORIZED ALTERATION OF THE *JACKSON V. VIRGINIA* STANDARD.

A federal court reviewing a due process claim that the evidence was insufficient to support a state court conviction must be governed by the highly deferential standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson, all* the evidence must be viewed in the light most favorable to the prosecution, and the claim must be rejected unless no rational trier of fact could have concluded that the prisoner was guilty beyond a reasonable doubt. 443 U.S. at 319. *Jackson* expressly held that the reviewing court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Indeed, *Jackson* requires that "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences *must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.*" *Id.* at 326 (emphasis added).

The decision of the Court of Appeals here clearly was *not* a straightforward application of *Jackson*. Under an unadorned *Jackson* analysis, any reviewing court would conclude, as the district court concluded (App. 27-28), that the jury could have reasonably determined that West had lied when he attempted to explain his possession. After all, it could have been perfectly obvious to everyone in the courtroom who saw and heard West's testimony, as the jury did, that the defendant's explanation was false. The Fourth Circuit, however, vacated West's conviction because in its judgment "there was nothing inherently implausible about [West's] explanation," his account "could not fairly be treated as positive evidence of guilt," and "was, at most, *a neutral factor* in assessing the probative force of the inference." (App. 18-19, emphasis added).

Thus, the court below was able to grant West relief only by fundamentally altering the *Jackson* standard. Instead of faithfully applying *Jackson*, the Court of Appeals adopted as its own the five-part analysis previously articulated by another court of appeals in *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Under this improperly diluted standard, the jury's assessment of credibility is hardly given the "full play" and deference demanded by *Jackson*. Instead, the credibility of the defendant's explanation is relegated to merely one facet of the five-part analysis, and even then the "standard" is couched in terms of "[w]hether the explanation given by the defendant, *even if discredited by the jury*, was 'not so implausible or demonstrably false as to give rise to positive evidence in favor of the government.' " (App. 15, emphasis added, citation omitted).

In a case such as West's where it is undisputed that the jury was properly instructed regarding the common law inference (App. 20), and that the defendant's possession of the stolen goods was both recent and exclusive, the jury's resolution of the case necessarily will turn on whether the defendant explains his possession, or if an explanation is made, whether that explanation is credible. After reading West's rather transparent trial testimony (CA4 App. 169a-179a), any court reviewing this case under the *Jackson* standard should have conceded that a rational jury could have found West's explanation incredible. The Fourth Circuit, however, substituted its own assessment of West's credibility for the jury's, and converted what is properly a determinative factor into a merely "neutral" one.[6]

This Court should exercise its certiorari power and summarily reverse the Court of Appeals' unauthorized amendment of the deferential standard this Court established in *Jackson*. *See* 443 U.S. at 319 n.13 ("[T]he standard

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[6] Other disturbing aspects of the Fourth Circuit's analysis are its dubious conclusions that the stolen goods "were found in 'plain view' in a search of West's residence" by the police, and that the inference in this case was "weakened" by the fact that West was found in possession of only a portion of the goods stolen from the victim's home. (App. 16-17). A thief who stores the fruits of his crime within his home should not be given "bonus points" merely because the stolen goods are left within sight of anyone he permits to enter. And, as to the latter conclusion, under Virginia law it has long been held that a jury "may infer the stealing of the whole from the possession of part." *See Henderson v. Commonwealth*, 215 Va. 811, 813, 213 S.E.2d 782, 784 (1975), *quoting Johnson v. Commonwealth*, 141 Va. 452, 456, 126 S.E. 5, 7 (1925).

announced today does not permit a court to make its own subjective determination of guilt or innocence."). Like the "new rule" and procedural default doctrines, *Jackson*'s mandate of deference is premised upon considerations of finality, comity and federalism that cannot be jettisoned merely because a federal court disagrees with the state courts' proper resolution of a prisoner's constitutional claim.

More than nine years ago, two Members of this Court observed that there has been "a series of cases in which federal courts retry issues of fact and credibility." *Anderson v. Fuller*, 455 U.S. 1028, 1032 (1982) (Burger, C.J., and O'Connor, dissenting). When this Court denied certiorari in *Fuller*, the dissenters warned that the lower federal courts' refusal to apply *Jackson* properly "threatens to lead to reversals of state court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact." *Id.* at 1033.

That dire prediction has become reality in the instant case. Here, as in *Fuller*, "the federal judges who set aside this state-court judgment acted like jurors, not jurists." *Id.*

CONCLUSION

This Court should grant certiorari and the judgment of the Court of Appeals should be summarily reversed.

Respectfully submitted,

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September, 1991

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PETITIONERS' APPENDIX

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-6686

FRANK ROBERT WEST, JR.,

Petitioner-Appellant,

versus

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY,
Attorney General of Virginia,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (CA-88-412-R)

Argued: July 18, 1990 **Decided:** April 29, 1991

Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Reversed and remanded by published opinion. Judge Phillips wrote the opinion, in which Chief Judge Ervin and Judge Murnaghan joined.

ARGUED: Cynthia Mazur, Student Counsel, APPELLATE LITIGATION CLINICAL PROGRAM, Georgetown University Law Center, Washington, D.C., for Appellant. Marla Lynn Graff, Assistant Attorney General, Richmond, Virginia, for Appellees. **ON BRIEF:** Steven H. Goldblatt, Director, Joseph Lombard, Patricia Mariani, Heidi Mason, Student Counsel, APPELLATE LITIGATION CLINICAL PROGRAM, Georgetown University Law Center, Washington, D.C., for Appellant. Mary Sue Terry, Attorney General of Virginia, Richmond, Virginia, for Appellees.

PHILLIPS, Circuit Judge:

Frank Robert West, Jr., appeals the dismissal of his petition for a writ of habeas corpus in which he challenged the sufficiency of the evidence to convict him of grand larceny in a prosecution by the Commonwealth of Virginia. We reverse and remand for the issuance of the writ.

I

On December 13, 1978, Angelo Cardova left his vacation home in Westmoreland County, Virginia. Thirteen days later, on December 26, 1978, he returned to find that his house had been burglarized and that various items, totalling about $3,000 in value, were missing. On January 10, 1979, law enforcement officers investigating another theft were allowed by West's wife to enter and search West's residence while West was incarcerated on other charges. In the course of this warrantless search, they seized some of the items stolen two to four weeks earlier

from Cardova's residence. Presumably for use as evidence they took away these items along with others. The items determined to be Cardova's included two television sets, a mirror framed with shells, a wood carving, groceries, a synthetic fur coat with the name Esther embroidered in the lining, a silk jacket decorated with the legend "Korea 1970," a mounted lobster and several other specifically identified pieces of property. The value of the Cardova items found in West's residence was about $1,100.

West was charged in a state prosecution with grand larceny, the felonious taking, stealing, and carrying away of over $100 in property. Va. Code Ann. § 18.2-95 (Repl. Vol. 1975).[1]

At trial, the prosecution presented the testimony of six witnesses. Cardova testified as to the timing of the theft and the nature and value of the property taken from his home. West's sister, who owned his residence, and his neighbor both testified that West was the sole inhabitant of the residence in which the property was found. The prosecution also presented the testimony of three law enforcement officials establishing the chain of custody for the Cardova property after it was seized by the police.

Testifying on his own behalf, West of course denied the theft and explained his possession as the result of purchases from flea markets at which he regularly bought and resold merchandise. He recalled having purchased some of the items at issue at a flea market from one

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[1] The statutory minimum value has since been raised to $200. *See* Va. Code Ann. § 18.2-95 (Repl. Vol. 1988).

Ronnie Elkins. He specifically recalled one transaction in the amount of five dollars and another for five hundred dollars. West was unsure about the flea market at which he had purchased the items from Elkins. He explained that he did not produce Elkins as a witness because he did not know until the day of the trial which items he had been charged with stealing. His testimony was somewhat confused and he was unable to account for how he acquired some of the merchandise.

The Commonwealth presented no rebuttal evidence. In closing argument, the defense argued that the Commonwealth had failed to present any direct evidence that West had stolen any items from the Cardova house. The Commonwealth, in closing, relied exclusively on Virginia's common law permissive inference that one in unexplained possession of recently stolen goods is himself the thief. It argued that West offered no reasonable explanation for his possession of the goods. The judge stated in his instruction:

> If you believe from the evidence beyond a reasonable doubt that property of a value of $100.00 or more was stolen from Angelo F. Cardova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

The jury found West guilty and sentenced him to ten years imprisonment.

During the course of the trial, West raised the issue of evidentiary sufficiency several times. At the close of the Commonwealth's case, West moved the court to strike the evidence that had been presented because Virginia had not proven West was the one who "collected these items and carried them off," and had offered no evidence to prove that West was the "active agent" who committed the larceny. He renewed his motion to strike the evidence at the close of West's case. After the jury rendered its verdict, he again renewed the motion to strike and also moved for the court to "set aside the verdict as being contrary to the law and the evidence." On direct appeal, as well as in a later state habeas corpus proceeding, West again alleged that the evidence was not sufficient to convict him of larceny and that the Commonwealth did not prove his guilt beyond a reasonable doubt. He was denied relief both on direct appeal and in his state habeas proceeding.

West then brought this habeas corpus proceeding under 28 U.S.C. § 2254 in the United States District Court, challenging on constitutional grounds the sufficiency of the evidence to convict him. The district court dismissed the petition by summary judgment, concluding that the evidence was sufficient to convict under the appropriate constitutional standard.

This appeal followed.

II

We first address two threshold objections by the Commonwealth to the consideration of this federal habeas petition. The first is that West's claim challenging the sufficiency of the evidence has not been exhausted in the state courts. The second is that its favorable consideration by a federal habeas court would involve the adoption of a "new rule" and that its consideration is therefore forbidden by *Teague v. Lane*, 489 U.S. 288 (1989).

In order to address these objections, it is necessary to identify the exact nature of West's constitutional claim. Though the claim undisputably is one that ultimately challenges the constitutional sufficiency of the evidence to convict, the parties disagree on the significance of the use of the permissive inference in defining the exact nature of that challenge.

The Commonwealth characterizes the challenge as being one to the facial constitutionality of the inference. West characterizes it as simply a classic due process challenge to the sufficiency of the evidence (here that used to invoke the inference) to convict him of larceny. We agree with West.

While the circumstances under which a "facial" challenge to the constitutionality of such a permissive inference can be made may not be entirely clear,[2] two of its identifying features are. West's claim has neither.

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[2] *See County Court of Ulster County v. Allen*, 442 U.S. 140, 155-63 (1979); *Barnes v. United States*, 412 U.S. 837, 841-46 (1973).

The first is that a "facial" challenge is directed at the jury instructions that allow the jury to draw the inference, not at the sufficiency of the specific evidence to convict. *See Barnes v. United States*, 412 U.S. 837, 841-43 (1973) (reviewing cases illustrating this mode of "facial" challenge). The second is that the standard for assessing such a challenge is the "more-likely-than not" standard of rationality developed in the line of cases, *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965); and *Tot v. United States*, 319 U.S. 463 (1943), *see Barnes*, 412 U.S. at 842, rather than the more stringent "beyond-a-reasonable-doubt" standard for assessing the sufficiency of particular evidence to convict laid down in *Jackson v. Virginia*, 443 U.S. 307 (1979).

From this it is apparent that West's claim is not one to the facial constitutionality of the inference. Inferentially, he concedes that. He raises no challenge to the jury instructions as such. Throughout, his challenge has been to the sufficiency of the evidence to take the case to the jury under any jury instructions. Where, as here, the only evidence of guilt consists of the "basic facts" of the inference, such a challenge is perforce a straightforward challenge to the sufficiency of that evidence alone to convict under the *Jackson v. Virginia* test. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 166-67 (1979) (where only evidence of guilt is that giving rise to permissive inference, basic facts of inference must meet beyond-reasonable-doubt standard rather than less stringent more-likely-than-not standard); *Cosby v. Jones*, 682 F.2d 1373, 1377 n.9 (11th Cir. 1982) ("a *Jackson v. Virginia* test is

still necessary even though a permissive inference instruction is valid").

With the nature of the challenge thus identified, we turn to the Commonwealth's threshold objections to its consideration in this habeas proceeding.

A

Once properly characterized, it is apparent that West's constitutional claim has been adequately exhausted in the state courts. The Commonwealth's contention that it has not been rests on the erroneous premise that it involved a constitutional challenge to the facial validity of the permissive inference. As indicated, it is not that, but is a straightforward due process challenge to the sufficiency of the evidence (in this case consisting solely of the basic facts of the inference) to convict.

In the trial court, as earlier noted, West raised sufficiency of the evidence challenges at several points: (1) by moving at the close of the Commonwealth's case to "strike the evidence" for failure to prove he was the "active agent" in the theft, J.A. at 166a; (2) by renewing this motion at the close of all the evidence, J.A. at 180a; (3) by renewing the motion after return of the jury verdict, J.A. at 204a; and (4) by moving after imposition of sentence to "set aside the verdict as contrary to the law and the evidence," J.A. at 204a.

He then pursued this claim by an assignment of error on direct appeal and later by raising it in his state habeas proceeding. In both proceedings he asserted that the evidence was insufficient to convict him and that the Commonwealth had not proved his guilt beyond a reasonable doubt. J.A. at 46a, 73a.

At all these stages, West adequately alerted the state courts that he was raising a constitutional claim. Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). The fact that West did not couch his objections and challenges in state court in specific constitutional terms is of no consequence; it is not necessary to cite "book and verse on the federal constitution" so long as the constitutional substance of the claim is evident. *Picard v. Connor*, 404 U.S. 270, 278 (1971); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) (claim in state court that "case fell far short of that required to prove . . . guilt beyond a reasonable doubt" adequately raises due process claim).

West's challenge to the sufficiency of the evidence under the federal due process clause to convict him thus has been properly exhausted in the state courts.

B

Similarly, once West's constitutional claim is properly characterized, it is apparent that to uphold it in this federal habeas corpus proceeding would not be to impose a "new constitutional rule" in violation of the *Teague v. Lane* limitation on federal collateral review.[3]

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[3] *Teague v. Lane*, modifying preexisting retroactivity principles, prohibits (with exceptions not relevant here) federal

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Here again, the Commonwealth's contention that it would violate *Teague's* "no new rule" prohibition is based on the erroneous premise that West challenges the facial validity of Virginia's permissive inference. If that were the claim, it might be arguable that its vindication would violate the "no new rule" limitation, for such a rule would prohibit further use of the ancient inference *in any circumstances*, on the basis that it facially violated the "more likely than not" test of rationality. As indicated, that is not the basis of West's claim which, instead, is simply that allowing the inference to be drawn by the jury *on the facts of this case* violated the proof-beyond-a-reasonable-doubt test of *Jackson v. Virginia*. Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the *Jackson v. Virginia* test to a "new" set of facts in evidence.

Hence, West's claim properly may be considered in this federal habeas proceeding free of the *Teague v. Lane* limitation.[4]

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courts from announcing in collateral review of state court convictions any rule of criminal procedure whose result "was not *dictated* by precedent existing at the time the [habeas petitioner's] conviction [in state court] became final." 489 U.S. at 301 (emphasis in original). In other words, it shields the final criminal judgments of state courts from being overturned by the adoption on collateral federal review of constitutional rules not in effect at the time of the state court judgment.

[4] By this we are simply saying that the result sought by the petitioner here is one that *was dictated* by constitutional precedent, that of *Jackson v. Virginia*, at the time West's state

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III

Turning to assessment of the evidence under the *Jackson v. Virginia* standard, we first note some general features of the permissive inference here used to convict West.

The inference that one found in unexplained possession of recently stolen goods was a participant in the theft is an ancient one. In use in the English courts as long ago as the early eighteenth century, it has been widely employed in one form or another in our state and federal courts from earliest times. *See United States v. Jones*, 418 F.2d 818, 821 (8th Cir. 1969) (tracing origins and uses of inference).

While the general, "run-of-cases," rationality of the inference may seem pretty clear on an intuitive basis, even that is not as clear today as it was in the days of its origins. As courts have noted in more recent times, the basic premise of the inference at its origins was the limited mobility of goods, and that premise has been substantially undercut by intervening technological and demographic developments. *See Commonwealth v. Turner*, 317 A.2d 298, 300 (Pa. 1974) (citing "advent of densely populated communities, revolutionary advances in communication and transportation, . . . increased mobility" as

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court conviction became final. *Jackson* was decided on June 28, 1979; West's state court conviction became final, for *Teague v. Lane* purposes, on May 30, 1980, when the Supreme Court of Virginia, finding no reversible error, denied leave to appeal. *See Teague*, 489 U.S. at 293, 311 (noting conviction final when Supreme Court denied certiorari).

reason for reexamination of inference's premises). Largely in consequence, a number of federal and state courts have come over the years to caution extreme care in its use or have actually modified it in ways which severely constrain its use. *See, e.g., Jones,* 418 F.2d at 823 (inference may be used in federal prosecution only when "corroborated by other circumstantial factors"; conviction of bank robbery reversed where only evidence was exclusive possession of bank bills stolen a day earlier); *United States v. Bamberger,* 456 F.2d 1119, 1134 (3d Cir. 1972) (inference only justified in presence of factors suggesting property could only have been obtained through theft); *State v. Heath,* 492 P.2d 978, 979 (Utah 1972) (requiring corroboration); *Turner,* 317 A.2d at 300-01 (suggesting that "recent possession" must be defined as being so recent that thief could not have divested himself of property); *see also State v. Smith,* 24 N.C. (2 Ired.) 402, 408-09 (1842) (admonishing that such inferences "even in the strongest case are to be warily drawn").

These decisions of course simply reflect the growing discomfort which some courts have felt about allowing convictions in this day to be based solely upon this inference. None has purported to put its blanket rejection of the inference on constitutional due process grounds. Indeed, we may assume, without deciding, for purposes of this case that its use is not facially unconstitutional under the more-likely-than-not test of "rational connectedness."[5]

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[5] *Barnes v. United States,* 412 U.S. 837 (1973), upholding against a facial challenge the closely related common law

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Nevertheless, the refusal of these courts, on nonconstitutional grounds, to countenance further use of the inference as the sole basis for conviction under *any* circumstance speaks strongly to the wariness with which its use in a particular case should be assessed under the *Jackson* constitutional standard. Every legitimate concern about the continued viability of the inference's basic premise which has led some courts to reject its use in any circumstances applies to its use in particular cases in jurisdictions such as Virginia that still allow it.

Application of the *Jackson v. Virginia* due process test – "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson,* 443 U.S. at 319 – is necessarily an evidence-specific judgment call. That test of course presupposes that juries accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt."

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inference of guilty *knowledge* from unexplained possession following recent theft, may suggest, though it does not compel, this assumption. As has been observed, the inference from these basic facts of knowledge is a much stronger one than is the inference of participation. *See Cosby v. Jones,* 682 F.2d 1373, 1381 (11th Cir. 1982).

In any event, because West's challenge is not to the facial constitutionality of the inference of theft, that issue is not before us.

Id. at 317. It was adopted to provide an additional safeguard against that possibility, and to give added assurance that guilt should never be found except on a rationally supportable "subjective state of near certitude." *Id.* at 315.

As indicated, the evidence here consisted entirely of that establishing, without real dispute, the basic facts of the common law inference: that about one-third in value of goods stolen between December 13 and December 26, 1978, were found on January 10, 1979, in the exclusive possession of the petitioner West, coupled with petitioner's own testimony explaining his possession as having come about by purchases in the interval. There was nothing in the specific evidence of the theft or the petitioner's later possession that added any further probative force to those bare facts. That is to say, there was no evidence at the theft site more specifically suggesting West's presence there – no fingerprints or footprints, sightings in the vicinity, other tracings of presence, or the like, nor was there at the site of discovered possession any physical indicia, such as soil samples or the like, suggesting West's presence at the theft site.

The evidence therefore poses a classic problem of applying the *Jackson v. Virginia* test to assess the sufficiency of essentially bare, unadorned evidence of recent theft and exclusive possession to convict one of the theft. While this, as indicated, in the end requires a judgment call, at least one court has suggested a principled way in which to approach it. The process suggested is one based on the realization that even essentially bare evidence of theft and ensuing possession necessarily will have some contextual factors pointing toward or away from guilt,

and that assessment should focus on these factors in order to test the inferential force of the specific evidence used to invoke the inference in a particular case.

In *Cosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982), the court collaterally reviewed a state burglary conviction in which the sole evidence of guilt consisted of the basic facts of the common law inference, specifically, that the petitioner attempted to pawn one of a number of stolen items of property within a few days after the theft. Applying the *Jackson v. Virginia* standard in habeas review, the court identified the following contextual factors as critical to assessment of the probative force of the particular evidence of theft and possession:

> (a) Whether the possession was recent, relative to the crime;
>
> (b) Whether a large majority of the items stolen in the theft were found in the defendant's possession;
>
> (c) Whether the defendant attempted to conceal the stolen items in his possession;
>
> (d) Whether the explanation given by the defendant, even if discredited by the jury, was "not so implausible or demonstrably false as to give rise to positive evidence in favor of the government";
>
> (e) Whether there is other corroborating evidence to support the conviction.

Id. at 1382-83.

Assessing the evidence on that basis, the *Cosby* court found it insufficient to convict under *Jackson's* test of rationality. Because we think this analytical framework is

sound, we adopt it for assessing the evidence here. Because we think *Cosby's* analysis also sound, we draw on it, factor by factor, for comparative purposes in the course of analyzing the evidence upon which West was convicted.

In *Cosby*, the items found in the petitioner's possession, a camera and lens, had been stolen only a few days earlier. Although that theft was relatively recent, the court properly noted that given the nature of the item, "it was not so recent that it is unlikely that [petitioner] could have purchased it." *Id.* at 1382.

In the instant case, the theft from Cardova's residence occurred sometime during a period of two to four weeks before some of the stolen items were found in West's possession. As in *Cosby*, given the nature of the stolen items, this theft was not so recent that a purchase in the interval could not have been likely.

In *Cosby*, only a camera and lens had been found in the petitioner's possession, whereas a stereo in addition had been stolen. The *Cosby* court properly noted that this disparity tended to weaken the inference.

In the instant case, the items found in West's possession made up only a third in value of those stolen from Cardova. As in *Cosby*, this disparity tends to weaken the inference.

In *Cosby*, rather than attempting to conceal the items found in his possession, the petitioner's possession was detected as he attempted to pawn them in the open market. The *Cosby* court rightly noted that this tended strongly to blunt the inference.

In the instant case, the evidence on this factor is not so affirmatively favorable to petitioner, but assessed independently, it is at best neutral and, if anything, favorable to him. The stolen items at issue here were found in "plain view" in a search of West's residence. No evidence as to their exact location in the residence was offered by the Commonwealth. Given the potential probative force of evidence that they were concealed within the residence, it may plausibly be assumed that they were not.

The next factor in the *Cosby* analysis concerns the explanation, if any, proffered by the accused. This factor of course derives from the fact that, as explained in the trial court's instructions to the jury, the inference of theft might be drawn only if the jury found beyond a reasonable doubt that any possession proved "has been unexplained or falsely denied by the defendant." This element of the common law inference has the effect of shifting the burden of production to the defendant to explain his possession, thereby imposing the risk that failing to explain or giving an implausible or effectively refuted explanation may result in the inference of guilt being drawn specifically for that reason.[6] As applied by Virginia, and generally, this inference is not the type dissipated ("burst") by a defendant's mere proffer of explanation; it may still be drawn by the jury's rejection

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[6] An effect that we may assume, though we do not decide, is itself constitutionally permissible in the use of this inference. *See Barnes*, 412 U.S. at 846 n.11 (shifting burden of production permissible if there is a "rational connection" between the basic facts and inferred facts of a permissive criminal inference). We need not decide this question here, because, as earlier noted, the inference itself has not been challenged on that basis.

of the explanation, *see Barnes*, 412 U.S. at 845 n.9; *Montgomery v. Commonwealth*, 269 S.E.2d 352, 353 (Va. 1980), but it is an inference almost certain to be drawn if a plausible explanation is not proffered.

This may well have been the strongest factor in petitioner's favor in *Cosby*, for his testimonial explanation that he had bought the stolen items from a man on the street was corroborated by an eyewitness, and was never directly refuted by the prosecution. The *Cosby* court reasonably concluded that though this explanation obviously was rejected by the jury, it was not so facially implausible or demonstrably false as to serve as positive evidence of guilt.

In the instant case, West's testimonial explanation also was of purchase in the interval. Unlike the situation in *Cosby*, there was no third person testimony corroborating this explanation and on cross-examination West exhibited confusion about the exact circumstances of some of the purchases. But he maintained his general explanation that he had purchased all the items at flea markets, and there was nothing inherently implausible about this explanation, including West's confusion about some of its details, nor did the prosecution directly refute it in any of its specifics.[7]

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[7] West's general explanation, given in testimony some five months after the events in issue, was that he regularly bought and sold items in various flea markets in the area, and that this was how he came into possession of the stolen items found in his residence. He identified only one individual seller, a Ronnie Elkins, from whom he claimed to have bought items.

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As did the *Cosby* court, we therefore conclude that the petitioner's proffered explanation could not fairly be treated as positive evidence of guilt, and was, at most, a neutral factor in assessing the probative force of the inference.[8]

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Pressed for details on cross-examination, he was unable to remember exactly where he had bought specific ones of the items, and was uncertain in particular about where his purchases from Elkins occurred and the exact items involved in those purchases. Questioned as to why Elkins had not been subpoenaed as a witness, West responded that he had not known until trial the particular items among those taken from his residence that he was charged with stealing from Cardova. While at first blush this collateral explanation may itself seem incredible, thereby drawing all else in question, it becomes more plausible when the circumstances of the items' seizure by law enforcement officers are considered. They were taken, along with a number of other items, from West's residence while he was incarcerated on another charge and, so far as the record shows, he therefore could have been unaware until trial of the exact items taken from his residence that allegedly were stolen from Cardova. The Commonwealth's indictment did not identify them except as "property of Angelo Cardova having a value of $100 or more," and while the Commonwealth suggests that West must have known because of "discovery motions by defense counsel," no such discovery motions and responses or other evidence were offered to the trier of fact in rebuttal of his testimony.

[8] An interesting contrast with West's facially plausible explanation of his possession may be found in one found so implausible as to amount to positive evidence of guilt in another, post-*Crosby*, Eleventh Circuit case, *United States v. Eley*, 723 F.2d 1522 (11th Cir. 1984) (that unknown truck driver had turned over to defendant the trailer of a disabled eighteen-wheeler rig to be towed to a distant truck stop).

The final factor in the *Cosby* analysis is whether there was any evidence other than the basic facts of recent theft and exclusive possession that tended to "corroborate" the inference. There was none in *Cosby*, and there is none in our case. As indicated, the record here is a classic example of guilt being found on no other basis than the inference that could be drawn from evidence that a theft was followed by the discovery some two to four weeks later of a portion of the stolen goods in the exclusive possession of a defendant who offered an exculpating explanation for his possession that was neither facially implausible nor directly refuted by any conflicting evidence.

We therefore conclude, as did the court in *Cosby*, that the evidence here, assessed in its entirety and in the light most favorable to the prosecution, was not sufficient to persuade any rational trier of fact of this petitioner's guilt, that his conviction on that evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding.

A determination in federal collateral review that a state court conviction by jury verdict was not supported by constitutionally sufficient evidence is one to be made with special caution and anxiety. Where, as here, it is made in the process of reversing a federal district court, it involves disagreement on this fundamental matter with a properly instructed state jury of twelve, a state trial judge, the state's supreme court, and a federal district judge. And it involves disagreement from a vantage point far removed from the immediacy of the testimonial evidence whose sufficiency is at issue. Indeed, there may be

no more delicate constitutional determination in federal collateral review, given its unique rejection not only of state judicial rulings but of state jury findings. Aware of its special delicacy when viewed in this stark way, we nevertheless have felt obliged under the constitutional test we apply to make that determination here. In doing so, we think it not amiss to suggest that if we are right – as of course we must believe we are – in so disagreeing with these others, it may well be mainly because of the high quality of advocacy in behalf of the habeas petitioner that was first made available to him in this court.

We also think it proper, in view of the ancient lineage and presumably frequent use in Virginia courts of the common law inference here in issue, to emphasize the narrowness of our decision as it deals with that issue. We do not hold either that the inference may not be used under any circumstances (because facially unconstitutional under the more-likely-than-not test), nor, on the other hand, that, if properly challenged, it would pass muster under that test. Because its use on that basis has not been challenged, we have not been required to address that issue nor the preliminary one whether under *Teague v. Lane* a habeas court could appropriately consider it if it were raised. These remain as open issues respecting the use of this inference, for we hold only that the specific evidence used to invoke the inference of guilt here failed to meet the beyond-a-reasonable-doubt test of *Jackson v. Virginia*.[9]

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[9] In view of this holding, we need not address West's further constitutional claim that he was denied due process by

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We therefore remand the proceeding to the district court with directions to issue the writ vacating West's conviction.

SO ORDERED

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the failure of the state courts to order a new trial on the basis of an unsworn "affidavit" submitted by Ronnie Elkins in 1987, which generally corroborated West's testimony that he had bought some of the allegedly stolen property from Elkins. J.A. 77a-78a.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.	CIVIL ACTION NO. 88-0412-R
v.	
ELLIS B. WRIGHT, WARDEN, et al.	(Filed Jun. 1, 1989)

MEMORANDUM

Frank Robert West, Jr., a Virginia state prisoner proceeding *pro se*, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He seeks to contest his conviction in the Circuit Court of Westmoreland County, Virginia, of grand larceny. Jurisdiction is appropriate pursuant to 28 U.S.C. § 2254. Respondents have filed their answer with attached affidavits and records, and petitioner has responded thereto. The matter is ripe for disposition.

Petitioner raises the following grounds for relief:

1. The Court erred in allowing the motion to suppress to be heard without three (3) witnesses summoned by the defendant.

2. The Court erred in denying the defendant's motion to suppress the evidence for the reasons set forth in the record of the hearing on said motion.

3. The Court erred in denying the defendant's motion to suppress. The seizure was illegal because law enforcement officers were without jurisdiction or authority to act.

4. The Court erred in denying defendant's motion to strike the prosecution's evidence at the close of the defendant's case. The evidence presented at the trial of the defendant was not sufficient at law to convict him of the offense alleged in the indictment.

5. The Court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden of proving the guilt of the defendant beyond a reasonable doubt.

6. The Court erred in allowing Angelo Cardova to show members of the jury photographs of allegedly stolen and recovered property before said photographs had been introduced into evidence.

7. There was a concerted effort on behalf of the Commonwealth and the police department to withhold evidence that would have changed the outcome of the trial in that a search for Ronnie Elkins was never initiated. (See T. direct and cross of Frank West.)

8. The trial counsel for the defendant was ineffective in that:

   (a) Counsel for the defendant failed to investigate facts brought to his attention by the defendant concerning Ronnie Elkins and his part in the matter. This failure to investigate facts left the burden of proof almost completely on the defendant instead of the Commonwealth.

   (b) Counsel failed to object to certain areas of questioning and evidence that would have been objected to had counsel investigated the facts given to him by

   the defendant concerning Ronnie Elkins. Appropriate objections would have changed the outcome of the trial.

9. Petitioner is entitled to relief because of newly discovered evidence: the affidavit of Ronnie Elkins supports petitioner's trial testimony.

In his first three grounds for relief, petitioner West seeks to attack the decision of the Circuit Court of Westmoreland County denying his motion to suppress. Ordinarily, a prisoner may not collaterally attack a state conviction on grounds that illegally seized evidence was admitted at trial. *Stone v. Powell*, 428 U.S. 465, 493-95 (1976). Nevertheless, if it appears that the state has not afforded petitioner "an opportunity for full and fair litigation of a Fourth Amendment claim," federal courts will entertain such an action. *Id.* at 494. Thus, the first inquiry must be whether the existing state procedure afforded petitioner an opportunity to raise his claim before the trial court. *Doleman v. Muncy*, 579 F.2d 1258, 1265 (4th Cir. 1978).

The record reflects that a motion to suppress was filed in the circuit court in the instant case. The matter came on for a hearing on June 8, 1979. At that time counsel for the defendant requested a continuance in order to obtain the presence of Howard Wray, a Chesterfield investigator, on grounds that his testimony would be critical to the motion.[1] Other than the need to have Mr.

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[1] The suppression hearing was a consolidated hearing concerning the suppression of evidence as it might affect petitioner in two separate criminal actions. In the one he was

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Wray present, counsel did not request the presence of any witnesses not then present. Those witnesses were placed upon their bond to appear at the next suppression hearing which was set for June 15, 1979. At the outset of the June 15 hearing, petitioner requested another continuance on grounds that three witnesses who had been summonsed were not present to testify. Counsel advised the Court, however, that the summonses had not been issued until the day before the hearing. When asked by the Court whether the witnesses were material, defense counsel stated that he thought the witnesses were important, but that their testimony would probably be cumulative to the testimony of other witnesses who were present. (T. 33, of June 15, 1979, proceedings). On that basis the Court denied the motion for a continuance, and the suppression hearing went forward.[2] The evidence at that hearing was in conflict. However, there was ample evidence that the defendant had given his wife the keys to his Gloucester home with the statement that she would know what to do with them; that the defendant and his wife were living together in Chesterfield County as man and wife; that defendant's wife was present on the premises searched; and that she executed a voluntary consent for the property to be searched. Petitioner was afforded

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represented by F. Warren Haney, Jr., and in the other, the conviction presently under attack, he was represented by Michael C. Mayo. Mr. Haney moved for the continuance, and Mr. Mayo specifically joined in that motion.

[2] Petitioner West was attempting to suppress the stolen property discovered in the January 9, 1979, search of his residence.

ample opportunity to present witnesses to attack the voluntariness of the consent, the validity of his wife's authority to grant consent, and any other issues he wished to raise. Accordingly, petitioner was afforded an opportunity for a full and fair hearing on his Fourth Amendment claim. Consequently, Claim 1 through Claim 3 will be DISMISSED.

Next, in grounds 4 and 5, West seeks to attack the sufficiency of the evidence upon which he was convicted. The standard of review in habeas corpus actions is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Commonwealth is not required to present a case that excludes every hypothesis of innocence. *Id.* at 326; *United States v. Bobo*, 477 F.2d 974, 989 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975).

In Virginia, larceny is the wrongful taking of personal goods, of some intrinsic value, belonging to another, without his permission, and with the intention to deprive the owner thereof permanently. *See Skeeter v. Commonwealth*, 217 Va. 722, 725, 232 S.E.2d 756, ___ (1977). Grand larceny is defined as larceny, not from the person of another, of goods and chattels of a value of $200.00 or more. Va. Code § 18.2-95 (Repl. Vol. 1988). At the time of petitioner's conviction, the statute provided that grand larceny consisted of larceny of goods and chattels having a value of $100.00 or more. Va. Code § 18.2-95 (Repl. Vol. 1975). Additionally, in Virginia, the unexplained or falsely explained possession of recently stolen property gives rise to an inference that the possessor was the

person who committed the larceny. *See Best v. Commonwealth*, 222 Va. 387, 389-90, 282 S.E.2d 16, ___ (1981); *Schaum v. Commonwealth*, 215 Va. 498, 501, 211 S.E.2d 73, ___ (1975).

The evidence at trial established that the residence of Mr. Angelo F. Cardova, in Westmoreland County, Virginia, was burglarized sometime between December 13 and December 26, 1978. On January 9, 1979, a search of petitioner's residence revealed many of the items stolen in the Cardova burglary. Mr. Cardova identified the items and testified as to their value. The aggregate value exceeded $100.00, as did several individual items. Furthermore, there was evidence sufficient to establish that West exerted a possessory interest in the stolen property. Accordingly, the decision to deny a motion to strike the evidence at the conclusion of the Commonwealth's case for a lack of sufficiency of the evidence was properly denied. After denial of the motion, petitioner West took the stand and attempted to explain his possession of the property by testifying he had purchased it from Mr. Ronnie Elkins. However, he was not sure he had purchased all of the property from Mr. Elkins, nor could he identify where all of the property had been purchased.

It is clear from the evidence that the defendant was found in possession of recently stolen property, and that the jury did not believe his explanation. Federal courts do not sit to review the credibility of witnesses in habeas corpus proceedings. *Pigford v. U.S.*, 518 F.2d 831, 836 (4th Cir. 1975). Accordingly, there was sufficient evidence upon which a rational trier of fact could find West guilty beyond a reasonable doubt of grand larceny. Accordingly, grounds 4 and 5 will be DISMISSED.

In ground 6, petitioner objects to the testimony of Angelo Cardova, which included showing members of the jury photographs of the allegedly stolen property, before the photographs had been introduced in evidence. The respondents assert that petitioner is barred from raising this claim because of a procedural default. Procedural default bars consideration of federal claims when the last state court rendering a decision plainly and explicitly declares that its judgment rests on a state procedural bar. *Harris v. Reed*, 57 U.S.L.W. 4224, 4226-4227 (U.S. Feb. 21, 1989). Absent cause and prejudice, further federal review is precluded. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). Here the record reveals that petitioner failed to raise the instant claim by objecting at trial to the evidence. The Virginia Supreme Court, asserting a valid procedural rule, dismissed the claim. *See Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, ___ (1974). Petitioner has failed to demonstrate either cause or prejudice for his failure to object. Claim 6 will be DISMISSED.[3]

Petitioner next alleges a concerted effort by the Commonwealth and the police department to withhold evidence. Specifically, he alleges that the Commonwealth and the police department never instituted a search for Ronnie Elkins, a witness who would have testified that he

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[3] In any event, the use of photographs for illustrative purposes is not error under Virginia law. *See Saunders v. Commonwealth*, 1 Va. App. 396, 398-99, 339 S.E.2d 550, ___ (1986). Moreover, absent "circumstances impunging fundamental fairness or infringing specific constitutional protections," the admissibility of evidence does not present a federal question. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960); *see also Chance v. Garrison*, 537 F.2d 1212, 1215 (4th Cir. 1976).

had sold certain items of property to the defendant. The record reveals that the Commonwealth was not even aware of the existence of Mr. Ronnie Elkins until petitioner West's testimony at his criminal trial. It can hardly now be faulted for failing to institute a search for an unknown witness. Claim 7 will be DISMISSED.[4]

In Claim 8, petitioner alleges ineffective assistance of counsel.[5] First he alleges that his attorney failed to investigate the facts concerning Ronnie Elkins and his part in the case. Respondents attached an affidavit from Michael C. Mayo, Esquire, West's attorney during the criminal trial, to their motion to dismiss filed with the Supreme Court of Virginia, on July 20, 1987. The affidavit recites

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[4] Respondents' argument that federal review of this claim should be barred because the Virginia Supreme Court asserted a procedural default is not well taken. The Virginia Supreme Court dismissed the claim solely because it found the claim conclusory. The record establishes that the petitioner was not notified to amend his petition, nor, apparently, was he afforded the opportunity to do so. While West's allegations before the Supreme Court of Virginia were not entirely fact specific, if the petition had been filed in a federal court, an answer would have been required from the respondents. Additionally, in federal court petitioner West would have been permitted to amend the petition if necessary to particularize his allegations. *See Raines v. United States*, 423 F.2d 526, 529 (4th Cir. 1970); *Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir. 1965), *cert. denied*, 385 U.S. 905 (1966). Virginia's interest in requiring habeas petitioners to allege specific facts to support their claims does not outweigh the federal interest in reviewing federal claims where the state has not given the petitioner the opportunity to particularize his allegations.

[5] Respondents' argument that federal habeas review of this claim is precluded is rejected. *See supra*, note 4.

specific times upon which counsel inquired of Mr. West concerning any witnesses he desired for his criminal trial. Petitioner repeatedly advised counsel he had no witnesses. On June 18, 1979, petitioner told counsel he wished to take the stand in his own defense, but he would not tell his attorney the details of his testimony. Two days before commencement of the trial, petitioner advised counsel that he wished to have Larry Gentry, an inmate, subpoenaed as a witness for the January 21, 1979, trial. Mr. Gentry was ordered to appear and was available for testimony at the trial. Petitioner does not deny the averments in the affidavit. Indeed, petitioner admits in his September 21, traverse that he did not raise the issue of subpoenaing Mr. Elkins until his testimony at trial. He states:

> Elkins was raised for the first time at trial due to counsel's failure to inform his client of what the [stolen] items were. Through that failure counsel denied the petitioner the right to have Elkins present at trial.[6]

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[6] Petitioner's statements that he did not know the items alleged to have been the subject of his arrest, indictment, and trial, is not believable. At the very least, he was aware that he was being charged with the theft of items which were found in his Gloucester home. It is certainly not unreasonable to expect a client who does not know the nature of the charges against him to ask the specifics from his attorney. Nor is it unreasonable to expect petitioner to have advised his attorney of the source of the recently obtained property stored in his Gloucester home. The record also reveals that West was served with a warrant setting forth the specific items alleged to have been stolen. While petitioner may not have seen the particular items

(Continued on following page)

Moreover, petitioner West has failed to show how he was prejudiced by his attorney's failure to investigate the possibility of subpoenaing Mr. Elkins. Petitioner himself states that he had to search for years to find Mr. Elkins. His own averments indicate the futility of requiring his attorney to locate Mr. Elkins in the short time between indictment and trial. Additionally, to the extent that petitioner argues that his attorney permitted a shifting of the burden of proof, the record belies the argument. While the inference regarding the recent possession of stolen property was raised, the Court nevertheless instructed the jury that the Commonwealth had the burden of proving its case beyond a reasonable doubt.

Next, West alleges his attorney was ineffective for failing to object to certain areas of questioning and evidence that would have been objected to had counsel investigated the facts given him by the defendant concerning Ronnie Elkins. Again, the uncontradicted affidavit of counsel, together with petitioner's traverse, establish that petitioner did not tell his attorney anything about Mr. Elkins prior to the time petitioner took the witness stand. In any event, petitioner has not demonstrated that he suffered any prejudice from his attorney's alleged failures. Accordingly, Claims 8(a) and 8(b) will be DISMISSED.

(Continued from previous page)

prior to trial, and even conceding that his attorney may not have specifically described those items, he was certainly aware that the items included a mirror, a TV set, a coffee table, and a bar. He certainly knew that he had recently purchased those from Mr. Elkins. An attorney cannot be faulted for knowledge concealed by his client.

Finally, petitioner alleges that he is entitled to habeas relief because of newly discovered evidence: the affidavit of Ronnie Elkins supporting petitioner's trial testimony. In order to obtain habeas relief on the basis of newly discovered evidence:

> [the] evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas.

Townsend v. Sain, 372 U.S. 293, 317 (1963); *see also Stockton v. Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1354 (1989); 28 U.S.C. § 2254(d). The affidavit of Ronnie Elkins goes only to the credibility of West's testimony. It does not go to the constitutionality of his confinement. Hence, Claim 9 must be DISMISSED.

For the foregoing reasons, respondents' motion for summary judgment will be GRANTED, and the petition will be DISMISSED.

Should the petitioner wish to appeal, written notice of appeal must be filed with the Clerk of the Court within thirty (30) days from the date of entry hereof.

An appropriate Order shall issue.

/ S / JAMES R. SPENCER

U.S. DISTRICT JUDGE

Dated: JUN 1 1989

CORRECTED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 8, 1991

No. 89-6686

FRANK ROBERT WEST, JR.
Petitioner - Appellant

v.

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY, Attorney General of Virginia
Respondents - Appellees

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Wilkins and Niemeyer voted to rehear the case in banc; and Judges Ervin, Phillips, Murnaghan, Sprouse and Wilkinson voted against rehearing in banc. As a majority of the judges did not vote to grant rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT,

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 9, 1991

No. 89-6686

FRANK ROBERT WEST, JR.

Petitioner - Appellant

v.

ELLIS B. WRIGHT, JR., Warden;
MARY SUE TERRY, Attorney General of Virginia

Respondents - Appellees

ORDER

Upon motion of the appellees, and for cause shown,

IT IS ORDERED that the mandate in this case be, and it is hereby, stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT,

JOHN M. GREACEN
Clerk